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CARDOZO *v.* MIDDLE ATLANTIC IMMIGRATION CO., Inc.

June 11, 1914.

[82 S. E. 80.]

**1. Brokers (§ 85\*)—Actions for Commissions—Evidence.**—In a broker's action for commissions on a sale of land, it was error to admit evidence that, several months after defendant listed the property for sale, under a contract with the broker setting forth the terms upon which he was willing to sell and fixing plaintiff's compensation, a third party, not a party nor privy to the contract sued on, authorized the broker's vice-president to sell the land for \$10,000 and have all over that amount as commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 106-115; Dec. Dig. § 85.\* 2 Va.-W. Va. Enc. Dig. 640.]

**2. Brokers (§ 85\*)—Actions for Commissions—Evidence.**—In a broker's action for commissions on a sale of land under an alleged verbal agreement by which the broker was to have anything over a specified price as commissions, where it appeared that the broker in its own name, as agent for defendant, contracted to sell the land to C., it was error to exclude defendant's testimony that he understood that the broker was buying the property and expected to sell it to C.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 106-115; Dec. Dig. § 85.\* 2 Va.-W. Va. Enc. Dig. 640.]

**3. Brokers (§ 85\*)—Actions for Commissions—Evidence.**—In a broker's action for commissions on a sale of land under an alleged agreement authorizing the broker to sell for \$10,500 net to defendant, and to have all in excess of that price as commissions, where defendant contended that he understood that the brokers were buying the property and intending to resell it, and it appeared that the broker contracted with C. for a sale of the property, a witness, who had testified concerning a conversation with the broker's officers, tending to show that the broker then considered that defendant was to receive \$10,500 net before it was entitled to any compensation for making the alleged sale, should have been permitted to testify that in such conversation, referring to the enforcement of the contract with C., the broker's officer stated that it, and not defendant, would have to enforce the contract.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 106-115; Dec. Dig. § 85.\* 2 Va.-W. Va. Enc. Dig. 640.]

**4. Brokers (§ 88\*)—Actions for Commissions—Instructions.**—In a broker's action for commissions, it appeared that defendant listed the property involved with the broker by a contract, fixing the price and limiting the broker's compensation in case of a sale to 10 per

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

cent. of the purchase money, and that the only modification of such contract was contained in a letter written by defendant on July 1st, agreeing that the broker might sell for \$10,500 net to him if the authority was exercised within 10 days, that on June 30th the broker contracted, as agent for defendant, to sell the land to C. for \$13,000, receiving C.'s check for \$5,000 as part payment; that on July 11th the broker delivered this check to defendant, taking a receipt therefor stating that the check was to be forwarded for collection attached to a deed and deed of trust; that as soon as the bank reported the payment thereof, defendant was to pay the broker \$1,000 on account of its part of the profit; and that the balance of the broker's profit, amounting to \$1,500, included in the deferred payment notes, was to be paid when such notes were paid, but that defendant was not to be personally responsible should the notes remain unpaid. Defendant claimed that up to that time he had not been told that the broker had made the contract with C. Held, that it was error to give an instruction adopting the theory that defendant, by receiving such check, ratified the contract of sale to C. by plaintiff, which the evidence tended to show defendant had never seen or been advised as to its terms and conditions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.\* 2 Va.-W. Va. Enc. Dig. 638.]

**5. Trial (§ 191\*)—Instructions—Assumption of Facts.**—In such action it was error to charge that it was defendant's duty to make C. perform the contract, instead of leaving the jury free to determine from all the facts and circumstances what the contract between plaintiff and defendant was.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.\* 7 Va.-W. Va. Enc. Dig. 730.]

**6. Brokers (§ 88\*) — Actions for Commissions — Instructions.**—In such action, it was error to refuse an instruction that the issue was whether defendant, after entering into a valid and enforceable contract with C., failed to perform it, because whereof the sale was not consummated, that the burden of proving this was on plaintiff, and that, although the jury might believe that such a contract was made between defendant and C., they must find for defendant, unless they further believed that defendant failed in some material point to perform such contract.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.\* 2 Va.-W. Va. Enc. Dig. 638.]

**7. Brokers (§ 88\*)—Actions for Commissions — Instructions.**—In such action, it was error to refuse an instruction that the general rule that a broker is entitled to his commissions when he has pro-

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

duced a purchaser, ready, able, and willing to purchase upon the terms and at the price authorized, and who has entered into a valid and enforceable contract, did not prevail where there was a special agreement between the broker and the principal as to the payment of commissions; that if defendant wrote such letter of July 1st, and on July 11th accepted for collection the check for \$5,000, and gave plaintiff a receipt therefor containing the provision stated, such letter of July 1st fixed the amount of compensation which the broker was to get, and that of July 11th the manner and conditions in which and upon which it would be paid; that together they constituted the only contract upon which the broker could claim compensation; and that, unless it was through defendant's fault that the check was not collected and the deferred payment notes paid, they must find for defendant.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.\* 2 Va.-W. Va. Enc. Dig. 638.]

**8. Trial (§ 191\*)—Instructions—Assumption of Facts.**—In such action, it was error to charge that if C. was financially able to comply with the contract, and refused to do so, and if defendant's title was good, defendant could have brought suit against C. and recovered the agreed price, and that unless the broker agreed to the abandonment of the contract by defendant, the jury should find for plaintiff, since it not only ruled as a matter of law that it was defendant's duty to sue, but as a matter of fact that the suit would have been successful, whereas the jury should have been left free to determine from all the evidence whether or not defendant was under any obligation to plaintiff to sue C., who resided in another state.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.\* 7 Va.-W. Va. Enc. Dig. 730.]

**9. Brokers (§ 88\*)—Actions for Commissions—Instructions.**—In a broker's action for commissions, it was error for the court, in charging as to the owner's duty to compel performance of a contract negotiated by the broker, to charge that the broker could not have sued the purchaser to compel performance, since an agent, having an interest in the contract such as his commissions, can sue to compel performance.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.\* 2 Va.-W. Va. Enc. Dig. 638.]

**10. Brokers (§ 36\*)—Duties of Broker towards Principal—Good Faith.**—A broker or agent, undertaking to procure a purchaser of property, must act in good faith and place his principal in full possession of the facts bearing upon his personal interest and relations to the subject and towards the prospective purchaser, and if he fails

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No: Series & Rep'r Indexes.

to do so, his transactions are voidable, and may be repudiated by the principal even though the principal is not injured by his ignorance of the facts.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 29, 30; Dec. Dig. § 36.\* 2 Va.-W. Va. Enc. Dig. 632.]

**11. Brokers (§ 65\*)—Actions for Commissions—Instructions.**—In a broker's action for commissions, it was error to refuse an instruction that, if the broker had contracted with defendant, whereby it was to receive a commission of 10 per cent., and while such contract was in existence it secured a purchaser for \$13,000, and thereupon notified defendant that it had a purchaser, and asked if he would take \$8,500, and upon his refusal asked if he would take \$10,500 net, and if, in ignorance that the purchaser had already agreed to pay \$13,000, defendant agreed to take such sum, and thereby the broker increased its compensation from \$1,300 to \$2,500, the broker had not dealt fairly with defendant, and could not recover where there was evidence of the facts hypothesized, and that one of the broker's officers led defendant to believe that the broker was getting only \$11,000 for the property, and that defendant would not have agreed to sell for \$10,500 net had he known that the purchaser had agreed to pay \$13,000.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 48-50; Dec. Dig. § 65.\* 2 Va.-W. Va. Enc. Dig. 638.]

Error to Law and Equity Court of City of Richmond.

Action by the Middle Atlantic Immigration Company, Incorporated, against B. Pollard Cardozo. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

*Haw & Haw*, of Richmond, for plaintiff in error.

*Meredith & Cocke* and *Gregory & Boulware*, all of Richmond, for defendant in error.

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RICHARDSON CONST. CO. *v.* WHITING LUMBER CO.

June 11, 1914.

[82 S. E. 87.]

**1. Set-Off and Counterclaim (§ 28\*)—Subject-Matter—Damages for Breach of Vendor's Contract.**—In an action for balance due for lumber furnished, defendant could set off a claim for the difference between the contract price and the market price of a bill of lumber which plaintiff failed to deliver, since such amount was susceptible of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.